SYED ABU BAKAR SYED HASSAN & ORS

v.

ZAINAL ARIFFIN HJ IBRAHIM & ORS

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[WRIT SUMMONS NO: 22-122-2005]
17 OCTOBER 2005

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Malay Customary Laws of Negeri Sembilan - Disputes - Whether should be determined by authorities provided by Negeri Sembilan Constitution - Laws of Constitution of Negeri Sembilan 1959, art. XVI(3) - Federal Constitution, arts. 71(1), 71(2) - Whether court has jurisdiction*

MALAY CUSTOMARY LAW: *Negeri Sembilan - Disputes - Whether civil courts have jurisdiction - Whether solely within jurisdiction of Dewan - Laws of Constitution of Negeri Sembilan 1959, art. XVI(3) - Federal Constitution, arts. 71(1), 71(2)*

The plaintiffs in their writ and statement of claim sought an injunction restraining the defendants from performing the KERJAN (installation) ceremony and a declaration that the installation ceremony which was in contravention of the Customary Laws of Sungai Ujong Negeri Sembilan ('the Customary Laws') was null and void. The installation ceremony was performed from 22 June to 26 June 2005 and YTM Dato Kelana Petra Hj Mubarak Hj Dohak was duly installed as the 10th Undang Luak Sungai Ujong. The first and second defendants applied for and obtained leave to enter conditional appearance pursuant to O. 12 r. 6 of the Rules of the High Court 1980 ('RHC'). Subsequently, they filed encl. 14 by way of summons-in-chambers for an order that the plaintiffs' writ and statement of claim be set aside under O. 12 r. 7 of the Rules of the High Court 1980 and relied on the ground that this court has no jurisdiction *ie*, the subject matter in this action is non-justiciable.

Held (setting aside plaintiffs' writ and statement of claim):

[1] From the provisions of art. XVI(3) of the laws of the Constitution of Negeri Sembilan 1959 ('the Negeri Sembilan Constitution'), the Dewan Keadilan dan Undang ('the Dewan') has exclusive jurisdiction to give advice on questions relating to, *inter alia*, Malay custom in any part of the State including the questions of the election or succession to or removal from or vacation of office of, *inter alia*, the Territorial Chief or Undang of Sungai Ujong in the instant action. (p 462 e)

[2] Reading art. 71(1) of the Federal Constitution,especially the second limb thereof conjunctively with art. 71(2), there is the Federal guarantee that any dispute as to the title to the succession of a Ruling Chief such as the Undang of Sungai Ujong in the state of Negeri Sembilan shall be determined solely by such authorities and in such manner as may be provided by the Negeri Sembilan Constitution. Under art. 71(1), the authorities are the Dewan set out more specifically in articles XIV and XVI of the Negeri Sembilan Constitution. (p 463 b)

[3] In light of the constitutional provisions and authoritative judgments of the Federal Court and the Court of Appeal, which are binding on this court, there was no doubt that our courts have no jurisdiction to hear and determine the dispute in this action as it was plainly and obviously non-justiciable. (p 465 e)

Case(s) referred to:

Dato' Hari Menon v. Texas Encore LLC & Ors [2005] 2 CLJ 688 HC ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Dato' Hj Shahari Hj Hassan v. Hj Shamsuddin Talib [1998] 4 CLJ 859 CA ***(refd)***

Faridah Begum Abdullah v. Sultan Hj Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah [1996] 2 CLJ 159 SC ***(refd)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***

Legislation referred to:

Constitution of the State of Negeri Sembilan, Chapter 5 art. XIV(1), Chapter 6 arts. XVI(1), (3)

Federal Constitution, arts. 71(1), (2), 72

Rules of the High Court 1980, O. 12 rr. 6, 7

For the plaintiffs - Mohd Iqram; M/s Nassir Hafiz Nazri & Rahim

For the defendants - Mohd Fairuz (A Ariffin A Borhan & Shahzad K Sultan with him); M/s Ariffin Shahzad

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

Enclosure (14) before me is the summons in chambers filed by the first and second defendants for an order that the plaintiffs' writ and statement of claim be set aside under O. 12 r. 7 of the Rules of the High Court 1980.

A reference hereinafter to an order and a rule is a reference to that order and rule under the Rules of the High Court 1980.

Factual Background

The plaintiffs in their writ and statement of claim sought, *inter alia*, the following reliefs:

1. An injunction restraining the defendants and their agents from having and/or performing the KERJAN (installation) ceremony;

2. A declaration that the installation ceremony which is in contravention of the Customary Laws of Sungai Ujong Negeri Sembilan ("the Customary Laws") is null and void; and

3. Damages.

The plaintiffs had also filed an ex parte summons in chambers seeking an injunction to restrain the defendants from proceeding with the installation ceremony to install YTM Dato Klana Petra Hj Mubarak bin Hj Dohak as Dato Klana Ujong or Undang. The hearing of the application was fixed for 4 July 2005, but the application was struck out when it was withdrawn by the plaintiffs, without any objection by the defendant and with no order as to costs.

The installation ceremony was performed from 22 to 26 June 2005 and YTM Dato Klana Petra Hj. Mubarak bin Hj Dohak was duly installed as the 10th Undang Luak Sungai Ujong.

On 4 July 2005, the first and second defendants had applied for and obtained leave to enter conditional appearance pursuant to O. 12 r. 6.

Subsequently they filed the instant application, on the ground that this court has no jurisdiction ie, the subject matter in this action is non-justiciable.

Principles Of Constitutional Interpretation

As the matter before me concerns the interpretation of the Constitution of Negeri Sembilan and the Federal Constitution, it is useful for me to first of all set out the relevant established principles of constitutional interpretation.

In *Dato' Menteri Othman bin Baginda & Anor. v. Dato' Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98, Raja Azlan Shah CJ (now HRH the Sultan of Perak), speaking in a panel of five judges of the Federal Court, concisely set out the principles of interpreting a constitution in the following words:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21. A constitution is suis generis calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *AG of St. Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129 at p 136.
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> It is in the light of this kind of ambulatory approach that we must construe our Constitution. …

These principles were applied by Mohd Azmi FCJ (as he then was) in *Faridah Begum bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah (Sued In His Personal Capacity)* [1996] 2 CLJ 159 SC; and also by me in *Dato' Hari Menon v. Texas Encore LLC & Ors* [2005] 2 CLJ 688, 705 and 706.

(See also *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481, per Gopal Sri Ram JCA.)

Jurisdiction

Learned counsel Mr. Mohd Fairuz, assisted by Mr. A. Ariffin A Bohan and Mr. Shahzad K. Sultan relied on the principle of forum non conveniens in submitting that the matter pertaining to Adat Melayu ie, the Malay Custom of Negeri Sembilan is outside the jurisdiction of this court.

Reference was made to:

1. Chapter 5 art. XIV(1) of the laws of the Constitution of Negeri Sembilan 1959 ("the Negeri Sembilan Constitution");

2. Chapter 6 art XVI(1) and (3), *ibid*,

3. *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC;

4. *Dato' Hj. Shahari Hj Hassan v. Hj Shamsuddin Talib* [1998] 4 CLJ 859 CA; and

5. Article 71(1) and (2) of the Federal Constitution.

For the plaintiffs, Mr. Mohd Iqram contended that this court is seised of jurisdiction over a dispute in which the plaintiffs as the Waris Klana are aggrieved. Support was sought, *inter alia*, in art. XVI(3) of the Negeri Sembilan Constitution.

In my judgment, the true dispute between the parties herein may be determined by a close scrutiny of the plaintiffs' statement of claim in which the plaintiffs as Waris Klana have commenced proceedings against the defendants as the members of the Lembaga Tiang Balai.

In essence, the plaintiffs alleged that:

(a) as Waris Klana they have the power, *inter alia*, to choose or elect an undang and to perform the installation ceremony for the undang; and

(b) the defendants as members of the Lembaga Tiang Balai had since 22 June 2005 performed the installation in contravention of the Customary Laws regulating the ceremony.

From the statement of claim, it is abundantly clear to me that the dispute between the parties herein revolves around the issue relating to Customary Laws including questions of the election and installation of an undang by the defendants as members of the Lembaga Tiang Balai ("the dispute").

In my judgment, the question of the jurisdiction of our High Court in relation to the dispute is synonymous with the question of the justiciability of that dispute.

For this purpose, it is to be noted that Chapter 6 art. XVI(1) of the Negeri Sembilan Constitution has established a Dewan Keadilan dan Undang ("the Dewan") in the following words:

CHAPTER 6 – DEWAN KEADILAN DAN UNDANG

Dewan Keadilan dan Undang. Amended vide N.S. gazette No. 546 of 1982.

XVI. (1) There shall be a Dewan Keadilan dan Undang to be called in English "The Council of the Yang di-Pertuan Besar and the Ruling Chiefs" hereinafter referred to as the Dewan to advise on questions relating to Malay Custom in any part of the State including questions relating to the election or succession to or removal from or vacation of office of any of the Ruling Chiefs referred to in Article XIV or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs and to exercise such functions as may be conferred upon it by this Constitution or any other written law.

Article XIV(1) thereof sets out the Ruling Chiefs *viz.* the undangs of the territories of, *inter alia*, Sungai Ujong who shall be persons lawfully elected in accordance with the custom of their respective luaks.

Under art. XVI(3) thereof, the advice of the Dewan on any question relating to Malay custom including the questions of the election or succession to or removal from or vacation of any of the Ruling Chiefs referred to in art. XIV shall be final and shall not be challenged or called in question in any court on any ground.

From the provisions of art. XVI(3), *supra*, there is absolutely no doubt that the Dewan has exclusive jurisdiction to give advice on the questions adumbrated above relating to, *inter alia*, Malay custom in any part of the State including the questions of the election or succession to or removal from or vacation of office of, *inter alia*, the Territorial Chief or Undang of Sungai Ujong in the instant action.

Article 71(1) of the Federal Constitution contains an entrenched provision pertaining to the Federal guarantee of the State Constitutions including eg, the Negeri Sembilan Constitution in the following words:

71. Federal guarantee of State Constitutions.

(1) The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State; but any dispute as to the title to the succession as Ruler of any State shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State.

In particular reference to the State of Negeri Sembilan, art. 71(2) has extended this constitutional guarantee to a Ruling Chief specifically as follows:

(2) Clause (1) shall, with the necessary modifications, apply in relation to a Ruling Chief of Negeri Sembilan as it applies to the Ruler of a State.

Hence, reading art. 71(1), especially the second limb thereof conjunctively with art. 71(2), I am of the view that there is the Federal guarantee that any dispute as to the title to the succession of a Ruling Chief such as the Undang of Sungai Ujong in the state of Negeri Sembilan shall be determined solely by such authorities and in such manner as may be provided by the Negeri Sembilan Constitution. Under art. 71(1), the authorities are the Dewan set out more specifically in articles XIV and XVI of the Negeri Sembilan Constitution as considered above.

In *Dato' Menteri Othman bin Baginda & Anor, supra*, the question of whether the purported appointment by the first appellant of the second appellant as the new Undang of Jelebu was contrary to the adat, custom and constitution of the luak of Jelebu. In the Federal Court, a panel of five eminent judges delivered five separate judgments.

Raja Azlan Shah Ag LP (now HRH the Sultan of Perak) held, *inter alia*, that:

1. The case was essentially one of interpretation of art. 71 of the Federal Constitution, and arts. XIV and XVI of the Negeri Sembilan Constitution;

2. Election of Undangs has since time immemorial been made in accordance with the ancient customary laws of their respective luaks;

3. Article XVI was drafted in broad and simple style which lays down principles of width and generality pertaining, *inter alia*, to Malay custom. It gives *carte blanche* to the Dewan to give advice on such matters ie, the decisions in the form of advice in the same way as the Privy Council gave advice to His Majesty the Yang di Pertuan Agong on matters of appeals from this country;

4. The Federal Court being the highest court in the land in constitutional matters should take the occasion to reaffirm expressly, unequivocally and unanimously the constitutional position of the Ruler in matters of succession including the election of the Undang and to hold that it is non-justiciable; and

5. The Dewan is a far more suitable forum for discharging the function in relation to the appointment of the Undang of Jelebu and it is open to the courts to refuse remedy on the ground that it is forum non conveniens ie, a court may decline to exercise jurisdiction on the ground that another body would be more appropriate.

Salleh Abas FJ (as he then was) held, *inter alia*, that:

1. The court has no jurisdiction;

2. The Negeri Sembilan Constitution recognises the continued application of the ancient constitution and custom of the State so long as they are not inconsistent with the State Constitution;

3. There exist five Ruling Chiefs including the Undang of Sungai Ujong (art. XIV) in addition to the royal personage styled as the Yang di Pertuan Besar of the State;

4. The Ruling Chiefs have to be elected in accordance with the custom of their respective territories (luaks): art. XIV(1);

5. The main function of the Dewan is "to advise on" questions relating to Malay Custom in any part of the state or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs; and

6. The expression "to advise on" must be the ascertainment and the application of law on a given subject to a particular set of facts, and the advice is binding and final making the matter or dispute "closed" in the same way as the advice pronounced by the Federal Court under art. 130 of the Federal Constitution.

Ibrahim Manan FJ (as he then was) also referred to art. 71 of the Federal Constitution, arts. XIV and XVI of the Negeri Sembilan Constitution and concluded that the court has no jurisdiction to try the dispute.

Hashim Yeop A Sani J (later CJ(M)) held, *inter alia*, that the Dewan must surely be regarded as the custodian of the adat in Negeri Sembilan and that the advice of the Dewan in the matter of adat must therefore be regarded as binding and conclusive.

However, Suffian LP (as he then was) in his dissenting judgment held, *inter alia*, that there is nothing in the above articles of the Constitution, State or Federal, ousting the court's jurisdiction over a disputed election of an Undang and that the court does have jurisdiction to adjudicate on the election.

The above majority decision of the Federal Court was followed by the Court of Appeal in *Dato' Hj. Shahari, supra,* where Lamin Mohd Yunus JCA (later PCA) held, *inter alia,* that:

1. The Dewan is the final arbiter of all issues referred to it (at p. 864g);

2. The Dewan is a more appropriate body to deal with a dispute in relation to the election to the office of undang "in accordance with the custom of the luak" as the Dewan is better equipped in the sense that the Dewan is learned in the Adat and not the civil court (at p. 865d); and

3. In any dispute in matters of Adat, the Dewan shall be the correct and proper body to be the final arbiter and not the civil court (at p. 866a).

In the same case, Mokhtar Sidin JCA also followed the aforesaid majority judgment of the Federal Court and held, *inter alia,* at p. 873d-f that the court should decline jurisdiction where the issues are matters pertaining to the customary law of the State including the succession of any of the Ruling Chiefs and that the Dewan is the best avenue to settle and decide on the issues.

Ahmad Fairuz JCA (now CJ Malaysia) agreed with the judgments of the two learned Judges of the Court of Appeal.

Conclusion

In the light of the above constitutional provisions and the authoritative judgments of the Federal Court and the Court of Appeal, which are binding on me, there can be no doubt that our courts have no jurisdiction to hear and determine the dispute in this action as it is plainly and obviously non-justiciable. I therefore set aside with costs the plaintiffs' writ and statement of claim in encls. (4) and (5).